Gilston Electrical Contracting Corporation *and* Robert Vitelli

Industrial and Allied Trades Workers, Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO *and* Robert Vitelli. Cases 29–CA–14472 and 29–CB–7438

August 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On May 14, 1991, Administrative Law Judge Robert T. Snyder issued the attached decision. Respondent Gilston Electrical Contracting Corporation filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Gilston Electrical Contracting Corporation, New York, New York, its officers, agents, successors, and assigns, and the Respondent Industrial and Allied Trades Workers, Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph A,2,(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to Robert Vitelli's unlawful layoff or its failure to recall him and notify him in writing that this has been done and that the layoff or failure to recall will not be used against him in any way.''

2. Substitute the following for paragraph B,1,(b).

''(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

3. Substitute the attached notices for those of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against our employees with respect to their hire or tenure of employment because they joined, supported, or assisted Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization or because they engaged in concerted activities for the purpose of collective bargaining or other mutual aid and/or protection.

WE WILL NOT threaten our employees with discharge and other unspecified reprisals if they vote in a Board-conducted election for certification of representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Vitelli immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole with interest for any loss of earnings and other benefits he may have suffered as a result of our action against him.

WE WILL remove from our files any reference to the layoff or failure to recall Robert Vitelli, and WE WILL

[1] No exceptions were filed to the judge's finding that Local 363 engaged in unfair labor practices in violation of Sec. 8(b)(1)(A) of the Act.

[2] Respondent Gilston Electrical Contracting Corporation (Gilston) has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that Respondent Gilston is not precluded from showing at the compliance stage of this proceeding that at some time after his unlawful layoff on October 17, 1989, employee Robert Vitelli would have been lawfully laid off because there was no work for him.

[3] We shall modify the judge's recommended Order by adding the standard expunction provision the Board includes in cases of unlawful discipline. See *Sterling Sugars*, 261 NLRB 472 (1982). We shall also delete the words ''interfering with'' from the cease-and-desist order the judge recommended be issued against the Respondent Union because these words do not appear in Sec. 8(b)(1)(A) of the Act.

notify him in writing that this has been done and that the unlawful layoff or failure to recall will not be used against him in any way.

GILSTON ELECTRICAL CONTRACTING CORPORATION

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our members that we will encourage their discharge by their employer if they vote in a Board-conducted election for certification of representative.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INDUSTRIAL AND ALLIED TRADES WORKERS, LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO

James P. Kearns, Esq., for the General Counsel.
Gary C. Cooke, Esq. and *Sanford Pollack, Esq. (Horowitz & Pollack, P.C.)*, of South Orange, New Jersey, for the Respondent Employer.
Edward J. Quinlan, Esq. of New York, New York, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on June 6, 1990, in Brooklyn, New York. The consolidated complaint in Case 29–CA–14472 alleges that Gilston Electrical Contracting Corporation (Gilston), threatened to discharge or take reprisal against any employees who voted in a Board conducted representation election in violation of Section 8(a)(1) of the Act, and laid off and refused to recall the Charging Party, employee Robert Vitelli, in order to discourage him from voting in the the election and because he joined and assisted Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO (Local 3), in violation of Section 8(a)(3) and (1) of the Act. The consolidated complaint in Case 29–CB–7438, alleges that Industrial and Allied Trades Workers, Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 363), directed its members not to vote in the election and threatened its members that it would encourage their discharge by their employer if they did vote in the election. In their respective answers, the Respondents denied the commission of any unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel and the two Respondents each filed posttrial briefs which have been carefully considered. On the entire record in the case including my observation of the witnesses and their demeanor I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Gilston, a New York corporation, with its principal office and place of business located at 338 East 95th Street, New York, New York, has been engaged in providing electrical contracting services to both commercial and governmental customers. During the year preceding issuance of complaint on December 29, 1989, Gilston, in the course and conduct of its business operations, performed services valued in excess of $50,000 for various enterprises located in the State of New York, including, inter alia, The Environmental Protection Administration and The Department of Sanitation, agencies of the City of New York, each of which enterprises is directly engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow. Gilston admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondents Gilston and Local 363 admit, and I find that Local 363 and Local 3 are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting: Pending Representation Proceeding and Positions of the Participants*

On April 28, 1989,[1] Local 3 filed a petition for certification of representative in Case 29–RC–7191, seeking an election in a unit consisting of all electricians, maintenance mechanics, helpers and apprentices, excluding all office clerical employees, guards and supervisors as defined in the Act, employed by all employers represented by United Electrical Contractors Association, a/k/a United Construction Contractors Association (the Association). The petition listed Local 363 as the recognized collective-bargaining agent and 725 employees in the unit. During the investigation of the petitioner's showing of interest, the Association originally submitted to the Region a list of employer-members totaling 91 named employers, including that of Gilston. Subsequently, in a report on objections and challenges issued following the election, the Regional Director found, inter alia, that as of the date of filing of the petition, there were 91 members of the Association. On September 13, the Association, Local 3, as Petitioner, and Local 363, as Intervenor, entered a Stipulated Election Agreement which was approved by Alvin Blyer, the Regional Director for Region 29 of the Board, on

[1] All dates refer to 1989 unless otherwise noted.

September 14, providing for an election to be conducted on October 18 among all employees in the petitioned for unit.

By letter dated September 25, Sanford Pollack, an attorney for Local 363 informed Regional Director Blyer that he had been advised that all members of the Association, except for six companies, had resigned from the Association, with approval of the Association and Local 363, and accordingly moved to be released from the stipulation. Among the employers whose purported resignation from the Association formed the basis for the Association's motion to withdraw from the stipulation was the Respondent employer, Gilston. By responsive letter to Pollack, copies to all parties, Regional Director Blyer denied that motion, noting, inter alia, that the Board in *Dittler Bros.*, 132 NLRB 444, 446 (1961) refused to allow an employer to withdraw from a multiemployer group after a petition for an election had been filed by a rival union, and that Local 363 had failed to make a claim or submit any evidence that any of the purported employer withdrawals from the Association antedated the filing of the petition on April 28.

In subsequent correspondence between them during October and prior to the election, Pollack renewed the motion on behalf of Local 363, and Regional Director Blyer reaffirmed his denial of the motion. As a consequence of the Association's position, it failed and refused to provide a list of eligible voters to the Regional Office for use in the election nor did it otherwise participate in the election and many of its claimed former members failed to post the notices of election provided them by the Region. In furtherance of what the Regional Director later described in his ''Report on Objections and Challenges'' as a ''collusion that took place between the Association and Intervenor (Local 363),'' whose common goal was to undermine the integrity of the election, ''certain employer-members of the Association, as well as representative of the Intervenor, vigorously discouraged employees from voting in the election, as well as engaging in other related alleged conduct including the acts and conduct alleged as unfair labor practices in the instant complaint.'' Thus, in a letter dated October 6, addressed to the membership, Patrick J. Bellantoni, secretary-treasurer of the Intervenor, Local 363, wrote, ''Because the National Labor Relations Board has failed to supply the parites [sic] to the election with information required by law to hold a valid and binding election, we suggest *that you do not bother to vote on the date set for the election.*'' Also, approximately a week before the scheduled election, Marvin Gilston, president of Gilston, admittedly told his employees who happened to be gathered together at his office and place of business in Manhattan, that with respect to the upcoming union election, he knew that Local 3 men were coming down to the job and talking to them, but that Gilston Electric was not part of this U.C.C. organization and it had nothing to do with the vote.

The election was held on October 18. It appears that the Petitioner, Local 3, mailed individual notices of election to those whom it knew to be unit employees. Furthermore, in the absence of an *Excelsior* list, employees voted by affidavit. The election was held at five polling places, one each located in the boroughs of Manhattan, Bronx, Queens, and Brooklyn in New York City, and in Nassau County. Of the 161 employees who participated, 5 voted for Petitioner and 156 had their ballots challenged. Thereafter, the Association and Intervenor each filed timely objections to the conduct affecting the results of the election. In a 68-page ''Report on Objections and Challenges,'' with exhibits attached, the Regional Director recommended in major part that the Association's and Intervenor's objections be overruled in their entirety, that certain challenged ballots be opened and counted and a revised tally of ballots be issued, that the challenges to certain other ballots be sustained, that a hearing be conducted concerning certain other challenges if the challenges to their ballots are still determinative of the outcome of the election on the issuance of a revised tally of ballots, and that after a revised tally of ballots is serviced on the parties, if the results of the election are determinative, that the appropriate certification be issued. Exceptions were filed to the report and, at close of hearing, were pending before the Board.

B. *The Alleged Unlawful Conduct by Respondents Gilston and Local 363 Against Robert Vitelli, the Charging Party*

Robert Vitelli, the Charging Party, is a journeyman electrician who installs electrical equipment. He first became employed by Gilston in June, on referral from Local 363. He was hired by Marvin Gilston, the president. He was initially paid at the rate of $14 per hour for a 35-hour week, but by July, was earning $26 per hour.

Vitelli testified that his direct supervisor was Albert Petrocelli. Marvin Gilston told Vitelli, ''When you go to the job, Albert's the boss. He's in charge, whatever he says, goes.'' On arriving at the jobsite at the beginning of the day, Albert assigned Vitelli and others specific projects to perform, and on their completion, he assigned them some other project or work detail. Petrocelli always checked the work performed, and when he was not satisfied with its quality, ordered the work of electrical installation to be removed and reinstalled. Petrocelli also disciplined employees. When employees reported late to work at a jobsite, he would send them home. If a particular employee's speed and production wasn't up to his standard, he would get on their case and thereafter tell them to pick up their pace and move faster. According to Vitelli, Petrocelli was the only Gilston supervisor on his jobsites.

Vitelli saw Petrocelli fire another employee, apprentice Lloyd Daniels, the same day he himself was transferred, October 17. On one occasion, when Vitelli became sick while at work, he told Petrocelli he wasn't feeling well and Petrocelli, on his own, told him to go home at midday. The employees did not fill out time sheets on the job. Instead, Petrocelli kept track of the electricians' hours, production and status of the work projects.

Petrocelli did not use the tools of the trade, but, rather, oversaw and was in charge of the worksites to which Vitelli was assigned. Petrocelli also was assigned a company van which had a telephone with which he communicated with the Gilston office.

After receiving a copy of the letter dated October 6 from Local 363 advising the members not to vote in the election scheduled for later that month, Vitelli discussed it on the job with fellow workers.

One morning, during their coffeebreak on the jobsite, a discussion ensued among Vitelli, another journeyman, Sal Domingo, four or five apprentices and Albert Petrocelli. Everybody was talking about whether they should go vote or not, and the Union doesn't hack the voting, so they don't

know if they should go vote. Vitelli spoke up and said, ''I think we should go vote.'' Someone said, ''If you are going to vote, it's probably for the other union.'' At this point, Petrocelli said, ''If you go vote, you know, your job is going to be on the line.'' Vitelli did not respond. All other employees present, except one, said they weren't going to vote. Apprentice Lloyd Daniels also said he was going to vote, hut did not voice a preference. Later, during the discussion, Vitelli did indicate that he intended to vote for Local 3.

On another occasion, before the scheduled election, as Petrocelli was laying out a job for him, Vitelli asked, confidentially, what he thought about it, and what he thought the outcome would be. Petrocelli replied, ''Well, I can't reply to you, because I'm supervision on the job.'' Vitelli said, ''I'm thinking about going down and voting.'' Petrocelli responded, ''Well, if you go down and vote and the boss finds out, you will surely get fired.''

A few days before the election, near the end of the workday, Petrocelli told Vitelli and the other workers at his jobsite to report back to the shop after work. The employer wanted to have a talk with them. When Vitelli arrived, he saw the other workers assembled. Also present were Marvin Gilston, the president, his two sons Greg and Rick Gilston, and Foremen Julie Salantano and Albert Petrocelli.

Marvin Gilston addressed them. He told them, ''Don't vote. You are not eligible to vote because I am not a member of the Association anymore.'' He then added, ''If your conscience so permits you to vote, go ahead and vote but I will not be happy with you.'' That was all Gilston said on that subject and the meeting ended.

Vitelli's last workday for Gilston was October 17, the day before the election. At the end, he was packing up his equipment and tools. Petrocelli pulled Vitelli aside and said, ''You have to report to this job, which is at the Metropolitan Correctional Center. It's a new job going up.'' He also said, ''Boss isn't happy with the production on the job. He wants to shut the job down.'' Vitelli was also given a slip of paper with the information as to when he was to report. Vitelli asked if the job was for Gilston Electric and Petrocelli said that it was. Vitelli then asked who was paying him. Petrocelli then said, ''Gilston Electric is paying you. You are going to be loaned out to another shop for one week's time.''

The following day, October 18, Vitelli reported to P.T. and R. Electric (P.T. & R.), and worked for that company for 3 weeks until the Federal Correction Center job was completed on November 9, when he was laid off. Vitelli then telephoned Gilston and spoke to one of the secretaries. He asked if Marvin was there. She said, ''No.'' He said, ''This is Bobby Vitelli. Do you know if I can go back to work if there is any work?'' She said she didn't know. She went on, ''There is no work right now. If there is anything, he'll get back to you.''

Vitelli also called Local 363 and was told by a secretary that there was no employment right now. They had nowhere to send him right now.

Vitelli testified that apprentice Lloyd Daniels was also laid off when he was, as was Edward Smith who was loaned out to the same employer as he was. He learned from Smith he was going back to Gilston when the Correction Center work was completed. Vitelli also noted that the other journeyman working with him at the Gilston jobsite on October 17, Sal Domingo, was not laid off and was still working for Gilston at the time of the hearing. Vitelli claimed that he had 1 week's seniority on Sal; they had been hired about the same time.

As to the status of the work on his last job for Gilston, Vitelli acknowledged that most of the major installation work was just about done, but there was still a lot of work to be done before completion.

Vitelli voted in the Board election held on October 18. The facts relating to his appearance to vote at the Manhattan polling place on that day present the other issue in this proceeding, as to whether Local 363 restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act.

According to Vitelli, he arrived at the polling place at about 7:50 p.m. Inside the building some distance away, were Joseph Canizio, Local 363 president, and Paul Rodriguez, a Local 363 representative. Vitelli went toward an elevator and saw Canizio signal Rodriguez to go upstairs. When Vitelli got off the elevator on the second floor, Rodriguez ran off the escalator and called him to the side. Rodriguez asked him what he was doing there. Vitelli replied he was looking to vote. Rodriguez asked, ''Didn't you get the letter from the Union, telling you not to vote.'' Vitelli said he had. Rodriguez said, ''So, what are you doing. What the hell are you doing here?'' Vitelli responded that he was here to vote because it was his right to vote. Rodriguez now asked, ''Well, what did your employer say about this?'' Vitelli said, ''Well, my employer said that if my conscience so sees fit, then I should go vote. So, that's why I'm here.'' Rodriguez went on, ''Well, how will your contractor feel if, you know, how would your boss feel if he found out that you are here to vote?'' Vitelli now said, ''You know, I really don't give a fuck about, you know, the employer right now.'' Rodriguez responded, ''Well, you'll give a fuck tomorrow when you are out of a job.'' Vitelli cursed at him, turned his back and started walking away. Rodriguez kept calling after him. Vitelli walked inside the voting room, told the Board Agent in charge that there was someone from Local 363 outside trying to stop him from voting. He was advised he could make out a complaint in the morning. Vitelli's ballot was challenged by Local 363 on the grounds that his employer was not part of the Association.

During his cross-examination by Gilston counsel, Vitelli recalled calling Gilston to mail him his last paycheck when he realized he wasn't getting paid from Gilston Electric, but was now working for P.T. & R. He acknowledged that he was receiving basically the same pay for the same 35-hour week while employed by P.T. & R. and that he had received at Gilston, the prevailing rate for government work. He also worked overtime at his option while employed by P.T. & R. He did not call or visit the Gilston office after his initial call to inquire about the availability of work on his layoff from P.T. & R. Yet, his pretrial affidavit given to a Board agent makes no mention of the phone call he placed to Gilston the Monday following his layoff, from P.T. & R. He lives with his father but did not receive a phone message from his father that Gilston had called him.

Vitelli further recalled that Edward Smith had informed him a few days before the P.T. & R. job ended that he was going back to work for Gilston. Vitelli noted that Smith, a journeyman electrician, had more seniority with Gilston then he did and had not been a Local 3 supporter.

Vitelli's last job for Gilston had been performed for the New York City Department of Transportation (D.O.T.) in Manhattan underneath the Riverside Drive at 158th Street.

During both his cross-examination by Gilston counsel and by Local 363 counsel, Vitelli repeated and reaffirmed the alleged coercive and threatening statements in the same or substantially similar language to that which he had used in attributing them to Petrocelli. Gilston and Rodriguez during his direct examination by General Counsel. In doing so, Vitelli withstood satisfactorily and with his basic credibility intact, the pressures of close and vigorous cross-examinations conducted by both Respondent counsel. I further find that Vitelli did make the one telephone call as he testified to the Gilston shop upon his layoff at P.T. & R. to seek recall from layoff at that time, although it was not recited in his affidavit. Aside from finding Vitelli's testimony to be generally credible, I rely on the fact that it would have been logical for Vitelli to have sought a return to his former position after having been farmed out to another firm during an apparent slow period for Gilston.

C. *The Respondents' Defenses*

1. Respondent Gilston

Marvin Gilston corroborated Vitelli as to the job to which Vitelli had been assigned at the time of his layoff. At the jobsite were six journeymen, apprentices and Al Petrocelli was running the crew. Gilston swore that he personally laid off Vitelli. He told Vitelli that the job was slowing down, that he got him a job with these people, go, and ''when the job is finished, give me a call. I'm sure that we'll be able to find some room for you again.''

A few days later, Vitelli called him to mail him his last paycheck and thanked Gilston for getting him the job where he was getting a lot of overtime.

Gilston testified that of the crew working at the Riverside Drive D.O.T. jobsite, two employees, Vitelli and apprentice Daniels, were laid off. But the week before, Gilston had laid off three other employees, including journeyman Eddie Smith, from another jobsite. He had also obtained a job for Smith at P.T. & R. Smith had 7 or 8 years seniority with Gilston. Rather than reassign Smith to another site where it would take him a week or two to learn the job, he was laid off. On his layoff, Gilston told him that when the job at P.T. & R. closes (or is winding down), give him a call a day or two before, and, he, Gilston, would find some place for Smith. Gilston swore this is what he also told Vitelli.

Sometime after November, another job started up, Vitelli, to Gilston's knowledge, did not leave any message that he had tried to contact him. Around mid-November, Eddie Smith called him to say the P.T. & R. job was winding down and asked if he, Gilston, had any room for him. Gilston said yes and told him to come back. Smith begged off on starting right away because he was exhausted from all the overtime hours and asked to take a week or two vacation. Gilston then called Vitelli and got his father. His father said his son was on vacation or hunting some place and that when he came back, he would get in touch with Gilston. According to Gilston, at that time, in mid-November, he had room to put some people back to work.

The Association's collective-bargaining agreement with Local 363, effective July 1, 1986 through June 30, 1986, by which Gilston was bound as an Association member at the time of its execution, contained no seniority clause, generally, and none governing order of layoff, or recall of employees, except for shop steward, who had top seniority for both purposes in article 17. It did require the covered employer, in article 29, to notify Local 363 in writing within 48 hours of any layoff or voluntary termination, failing which, the employer's obligation to make union dues and find contributions shall continue unabated. The agreement, in article 27, also prohibited any employer to ''farm out,'' ''lend,'' transfer or assign, temporarily or otherwise, any of its employees to any other employer under any circumstance. Gilston testified without contradiction that for purposes of determining order of economic layoff, it was his practice to apply seniority as determined by classification on a particular job. That was why Eddie Smith was laid off before Vitelli. He was least senior on a job which slowed down earlier than Vitelli's.

As to Vitelli's seniority status on the D.O.T. job, Gilston produced payroll records which established that, contrary to Vitelli's claim, Salvadore (Sal) Domingo, another journeyman on the same job, had an earlier starting date than Vitelli, having first worked on May 31, while Vitelli started on June 14. Domingo was also issued a pay check of $649.22 dated June 7 for work performed prior to that date. Vitelli's first pay check is dated June 21, showing pay received of $415.81 for prior services. In the quarter March 1, 1989 through June 30, 1989, Domingo earned $4082.40 and Vitelli earned $1314.74. Vitelli had been the least senior journeyman employed on the D.O.T. job.

Gilston explained that Petrocelli was a working foreman and member of Local 363. He had no power to hire or fire any worker. He had no supervisory powers. He was the foreman on the D.O.T. job, indeed, he had been in charge of the crew as Gilston earlier noted. Petrocelli had been assigned a mobile phone to call in for materials and communicate with the office since the jobsite trailer which contained a telephone was often locked. The company van he drove contained power and other tools and was driven home by Petrocelli at night as a convenience and to safeguard the tools.

Gilston learned nothing about union sentiments of the men from Petrocelli, did not ask him to question employees about their preference and was unaware of Vitelli's voting choice. Vitelli, in fact, wore a Local 363 T-shirt all the time. Gilston did speak to the men regarding the upcoming election as earlier described. It was not a meeting he called, but rather came about because all the men happened to be in the office en masse the evening before payday to pick up their checks early. As Gilston explained it, he told them there was a lot of talk going back and forth about the election. He knew Local 3 men were coming down to the job, and talking to them. Gilston Electric was not part of the U.C.C.A organization and had nothing to do with the vote. But, if they saw clear to go down and vote, he would not stop them. Gilston denied telling the employees he would not be happy if they did vote.

Gilston recalled that in the period October to November, he had four active jobs, including the D.O.T. job. All four were then in the process of winding down with only finishing work and punch lists remaining. Another job, at a D.O.T. transportation garage in the Bronx, was just starting up as the

others were concluding, but a work crew had already been assigned. It was not until February 1990 that a totally new job was started, at Bellevue Hospital in Manhattan.

During his cross-examination, Gilston acknowledged that while he usually had a ratio of six journeyman and two apprentices assigned to most jobs, he was not sure of all of the journeymen remaining on the D.O.T. site on October 17, having probably reassigned at least two or more of them to other jobsites sometime before that date. He was sure that Domingo and Petrocelli were still on that jobsite on the date in question.

Gilston also explained that Foreman Julius Santano was actually in charge of all jobsites. Sometimes, he would take care of two jobs, staying at each a half day, or at one a whole workday. Then, in a surprising disclosure, somewhat at variance with the foregoing, Gilston claimed that Santano actually spent three-quarters of his time, 5 days a week at the D.O.T. site. Even during this disclosure, Gilston changed the three-quarters of his time, to 5, 6 hours, sometimes all day, sometimes 3 hours. Later, Gilston acknowledged that Petrocelli gave the work orders to the men, and, in the absence of Santano, gave out the work, made sure everything was going right and was responsible for the work on the job. Petrocelli also kept the records of the work performed on the various jobs for purposes of preparing invoices for payment. Petrocelli also usually was the one who was informed when an employee reported late and was the foreman from whom the journeymen requested permission to leave early when an emergency arose during the day.

As to his layoff of Vitelli, Gilston at first recalled personally informing Vitelli of his layoff in the office, with a lot of people there. Then, almost immediately, Gilston could not recall whether he spoke to Vitelli about the matter by phone, or in the office (Tr. 127). But, although now vague about the setting and location, Gilston insisted he was the one who told Vitelli about the other job he had for him, with a lot of overtime and Vitelli was happy about it.

Gilston swore he made the decision to lay off Vitelli when he was able to find him another job, and that was on October 17. Since Vitelli worked as a team with the apprentice Daniels, both were let go the same day.

Gilston denied that he had informed Petrocelli to tell the workers to come up to the shop after work on the day he spoke to them about the election.

2. Respondent—Local 363

Paul Rodriguez, business representative for Local 363, was called to testify by the Respondent Union. Rodriguez denied that Local 363 President Canizio was at the Manhattan voting site on October 18. Rodriguez arrived at the polling site at 7 p.m. He recalled seeing Vitelli as he entered a little later, wearing a Local 363 T-shirt and quickly approached the elevator. Rodriguez took the escalator to the second floor so he could speak to him. Rodriguez approached Vitelli when he got off the elevator and asked, ''Excuse me, are you 363 and ''are you here to vote?'' Vitelli said, ''Yes.'' Rodriguez said, ''Did you receive a letter stating that it was not necessary to vote?'' At this point Vitelli said, ''Fuck the letter, my employer told me to come here and vote, and I am going to vote.'' At that point, two men wearing Local 3 jackets walked over and said, ''Come on, Bobby, let's go'' and they accompanied him past the corridor to where the election was being held.

There was some attempt, not entirely clear on the record, to describe an individual who was standing near Vitelli at some point during their conversation, perhaps wearing a Local 3 jacket, as a ''giant.'' Rodriguez accompanied his denial of making any threat to Vitelli with a description of his own relative small stature, 5 feet, 6 inches tall and weighing 150 pounds.

In weighing Gilston's and Rodriguez' credibility against that of Vitelli, Petrocelli never having taken the stand to testify, I am struck by the strong manner in which Vitelli basically stuck by his narrative on both his direct and vigorous cross-examinations and also how his recital appears far more credible when considered in light of its inherent probability and the somewhat unlikely and farfetched explanations Gilston and Rodriguez presented denying certain events or statements attributed to them. Thus, Gilston's explanation as to why all of his employees were gathered at his office ''en masse'' after closing one evening a few days before the election is unconvincing, particularly absent a showing that all employees would regularly make an extra trip back to the office after a full day's work to collect pay they could receive the next day at their worksites. Vitelli's explanation for his appearance at the office is far more tenable, that he was directed by Petrocelli, given the proximity to the election and Gilston's evident concern in making his point with the workers that he was not (or no longer) part of the Association and they should not vote. It was natural for Gilston to follow his acknowledgment that an employee's conscience could dictate his decision to participate or not with the personal comment that if the employee did, he, Gilston, would not he happy with that result. I credit Vitelli's testimony on this point.

I also credit Vitelli as against Rodriguez' denial as to the full extent of the conversation he swore he held with Rodriguez minutes before he entered the polling area to vote on the evening of October 18. Rodriguez' partially coherent explanation that the size of Vitelli's apparent companion inhibited him from any more emphatic efforts to stop Vitelli from voting is not credible. The manner and confrontational tone Rodriguez admitted using in stopping and questioning Vitelli in implementation of the Union's no-voting policy on the last leg of Vitelli's trip to the polling area is strongly suggestive that when the dialogue became heated and Vitelli sought to disengage himself, Rodriguez turned to making graphic, what he, as Local 363 business representative, understood would be the employer's reaction to Vitelli's voting the following day. Vitelli is credited that the conversation proceeded to its conclusion as he described it.

As earlier noted, Petrocelli was not called by Gilston to rebut any of the comments Vitelli attributed to him. I find Vitelli's straightforward account convincing that on the two occasions he enumerated, Petrocelli responded to his intention to vote in the election with a comment, at first, that he was putting his job on the line, and then, later, he would surely get fired. I also credit Vitelli that, as he related, it was Petrocelli, and not Gilston, who informed him at the end of the workday on October 17, that he would be reporting to another jobsite on a loan out for 1 week and that Gilston was not happy with production on the job. Gilston's recollection of the setting of the conversation he may have had with Vitelli about his reassigning him to another job with lots of

overtime was inconsistent, at first describing a conversation in his office with a lot of people there and immediately thereafter failing to recall whether Vitelli was there in person at all. Gilston may have confused this asserted conversation with another, some days later, to which he had earlier testified, when Vitelli telephoned him to request his last day's pay for work performed while on Gilston's payroll.

Analysis and Conclusions

A threshold issue regarding the alleged coercive nature of the statements Petrocelli made to Vitelli is raised by virtue of Respondent Gilston's defense that Petrocelli was not a supervisor under the Act. In the course of attempting to dispute Petrocelli's status, Gilston acknowledged that Petrocelli ran a crew at the jobsite where Vitelli was employed. Gilston's attempts to portray Foreman Santano as being present three-quarters of his work time at the D.O.T. site and to diminish Petrocelli's status are not credited, given his earlier and later varying accounts of Santano's work schedule, and Vitelli's unrebutted account of Petrocelli's sole and direct supervision of the site and the men assigned there.

Vitelli's credited testimony portrays Petrocelli's actual conduct in running the D.O.T. jobsite for Gilston, as exercising authority to assign and review work, require reinstallation of unsatisfactory work, discipline late arriving employees by sending them home, approve employee emergency requests to leave work early, and order more production and efficient work efforts. The execution of these functions, coupled with Vitelli's credited testimony that Gilston told him Petrocelli was in charge and his orders should be followed, Vitelli's own acknowledgement of his supervisory status as well as his possession of the apparatus of authority of a portable phone and company van and lack of possession or use of the tools of the journeyman's trade, leads me to conclude that Petrocelli exercised the indicia of authority to assign, discipline, and responsibly direct employees in the course of which he was required to use independent judgment, and thus met the requirements of a supervisor under Section 2(11) of the Act. Petrocelli's layoff of Vitelli on October 17 and termination of apprentice Daniels on the same date buttress this conclusion. I also conclude that by virtue of the apparent authority conferred upon him by Gilston, employers would reasonably conclude that Petrocelli was acting in a supervisory capacity and was representing Gilston in his dealings with the employees both at the job and in reporting his understandings of Gilston's negative reactions to their association with Local 3 or their expression of intent to vote in the Board conducted election.

Turning to the substantive allegations of violation, I first deal with Petrocelli's remarks. It is apparent, giving his standing as a Gilston statutory supervisor or as an employer clothed with the apparent authority to act as one, that his comments to Vitelli made in reaction to Vitelli's expressed intention to vote in the election, were binding on Gilston, and, indeed, represented the Respondent employer's attitude. As explained by Vitelli, Petrocelli's two statements followed not only his announcement of a desire to vote but a disclosure of his support for Local 3. Vitelli was the only employee to make such open disclosures, although Daniels joined him in announcing that he, too, also intended to vote. Even without making known his support for Local 3, it was fairly evident that the other employees, including Petrocelli, a member of Local 363, would take Vitelli's and Daniels' intention to vote as not only contrary to Local 363 policy but as an expression of opposition to Local 363 in the upcoming election.

In telling Vitelli in front of other employees on break that in voting he was putting his job on the line, Petrocelli was informing Vitelli and all other employees present that his job was at risk and could be terminated for exercising this Section 7 right. Such an utterance constitutes a threat in violation of the Act. Then, later, in response to Vitelli's open mulling over of his interest in voting, Petrocelli confirmed that Company knowledge of his act of defiance of Local 363 and Gilston policy would surely result in his dismissal, Petrocelli was now making explicit what he had earlier implied. This utterance, as well, constitutes a threat in violation of Section 8(a)(1) of the Act.

The circumstances surrounding Gilston's own expressions of opposition to employee participation in the election which he made clear to assembled employees ordered back to the office one evening after work a few days before the election and the words he used, made clear the depth of Gilston's aversion to the election process in which Local 3 was seeking to supplant Local 363 as bargaining representative in the multiemployer Association-wide unit. As a participant in the multiemployer effort to withdraw from the Association apparently designed to forestall the election itself, Gilston had a stake in seeing to it that his workers stayed away from the polls. While professing a recognition of employee conscience in the matter, Gilston's final comment, expressing unhappiness with anyone who had the temerity to actually defy the Local 363—multiemployer uniform opposition to participation in the election process, brought home to employees, the risk they undertook in exercising their right of franchise. Even though the result of failing to assuage Gilston's unhappiness was pointedly left unstated, it was reasonable for the employees to conclude that if they voted, they were vulnerable and subject to consequences which could adversely affect their job tenure and status. Petrocelli's earlier statement made to Vitelli in the hearing of employees in the breakroom made that evident. That the highest Gilston managerial authority was making this veiled threat at a required meeting after work hours in the management office, reinforces my conclusion. Gilston's expression of unhappiness constitutes a threat of unspecified reprisals to employees if they voted in the election in violation of Section 8(a)(1) of the Act.

As to the Local 363 representative's statements, when Rodriguez responded to Vitelli's expression of lack of concern with Gilston's attitude toward his voting, he was, in effect, pointing out, as Local 363 business representative, that Vitelli would be out of a job if he continued to defy both the union and his employer by voting. Local 363's agent was threatening Vitelli that it had the motive and ability as exclusive bargaining representative to bring pressure to bear on a willing employer to see that Vitelli would be discharged. As Rodriguez had the apparent authority to implement his threat, his statement thus constituted a direct form of coercion and interference with Vitelli's exercise of an important Section 7 right which impacted on his continued status as an employee. The Union thus violated Section 8(b)(1)(A) of the Act.

I turn now to the issue of Vitelli's alleged discriminatory layoff on October 17.

Gilston's strong motivation to punish and retaliate against those employees who made known their right to cast a ballot in the scheduled election has been established on this record, both through Petrocelli's threats to Vitelli and Gilston's own verbal warning to employees uttered at the meeting he had called of employees solely to make clear his company's noninvolvement in the election proceeding. I may also infer that Gilston was aware of Vitelli's outspoken support of Local 3 from Petrocelli and that Petrocelli's own threats would not have been made without the prior knowledge or approval of Gilston or at least without Petrocelli's understanding of Gilston's hostility to Local 3 supporters. Thus, Gilston, armed with the knowledge of Vitelli's intentions, had both the motive and opportunity to follow through on the outstanding threats.

In his handling of Vitelli's separation, Gilston further revealed his discriminatory motivation. Contrary to his dealings with Smith, personally informing Smith of the outside P.T. & R. job to which he was to be assigned and soliciting his return to employment on completion of work there, in the case of Vitelli, Gilston chose to have Petrocelli inform Vitelli of his ''loan out'' without informing him he was going onto another payroll and without inviting a later return, and accompanied by words of dissatisfaction with the production accomplished on the D.O.T. job. Gilston's failure to mention or rely on this alleged shortcoming in performance presents a significant inconsistency between his version of the factors resulting in the layoff and those which Vitelli credibly attributed to Petrocelli. Furthermore, in presenting conflicting testimony between Respondent's supervisor and president on a very central fact, as to who informed Vitelli of his separation, Gilston has only served to strengthen the case for violation.

It is noteworthy also that the only other employee let go on October 17 was Lloyd Daniel, the only other employee who had publicly announced his intention to vote. While there is no complaint allegation made on Daniel's behalf, I may weigh the facts relating to his separation as they may reflect on the Respondent employer's motivation. These facts show that the only two employees separated on October 17 were the only Gilston employees who had publicly vowed to vote in the election shunned by Local 363 and Gilston.

The timing of the removal of these two employees from the payroll is also significant. It was accomplished on the eve of the election at a time when it would have the most chilling effect on the other employees as they pondered whether to participate in an election which both their employer and Union were combining—even conspiring—to thwart.

At the time of the two layoffs, Gilston claimed the slowing down of the D.O.T. project as the prime factor in his decision and his finding of another job for Vitelli as determining its scheduling. Yet, according to Gilston, work had slowed down for some time before the layoff and business did not pick up until after the new year. Respondent produced no records showing a need for reduction of the work force on the very date in question. Furthermore, Gilston was hazy about the number of journeymen remaining on the job, originally listing six, with two apprentices, and later having recalled two or more journeymen had been earlier reassigned to other projects. While Smith's earlier layoff may serve to strengthen Gilston's contention that seniority on the particular job played a role in layoff selection, the particular timing of Vitelli's, coming as it did on the eve of the election, remains unexplained on this record. As earlier noted, the disparate treatment accorded Vitelli at the time of his layoff strengthens the conclusion that more was at stake here than locating another contractor who could employ Vitelli in the short term. Of course, by relocating rather than discharging Vitelli, Gilston was reducing the probability that Vitelli would complain or seek to make a Federal case out of his treatment.

In later contacting Vitelli's father, Gilston has not shown that any work was available to Vitelli at the time—in mid-November—other than a short-term assignment pending Smith's return. Neither by his testimony has Gilston demonstrated that the telephone call constitutes an offer of any employment. Gilston merely asked his father to have Vitelli contact him. As an attempt to show a valid offer of reinstatement which would serve to cut off further remedial relief to Vitelli, the evidence of this contact is ineffective.

It may be that Vitelli's credited telephone call to Gilston on his layoff from P.T. & R. was insufficient to make Gilston personally aware of his current availability and desire to return, or that Gilston never received the message of Vitelli's availability, yet, it was Gilston who set the discriminatory conduct in motion by laying off Vitelli in the manner and at the time he did and it was Gilston's responsibility, if he sought to make a valid offer of reinstatement, to have complied with the Board's requirements, under the circumstances, by forwarding an offer in writing directly to Vitelli. This, he never did. Under all of the circumstances, including the fact that Gilston's attempt to contact Vitelli appears to have succeeded Vitelli's filing of the instant charge on November 15, I conclude that Gilston's inadequate attempt to contact Vitelli was an invalid offer of recall or reinstatement, clearly ineffective to toll Gilston's backpay liability. Gilston's contact with Vitelli's father was neither ''firm, clear [or] unconditional,'' *Lipman Bros.*, 164 NLRB 850 (1967), see also *Consolidated Freightways*, 290 NLRB 771, 772 (1988), and thus, apart from Gilston's failure to communicate directly with Vitelli, was clearly invalid in this respect.

I conclude that General Counsel has shown by a preponderance of the evidence, that Gilston, in laying off Vitelli on October 17, and thereafter in refusing to recall, or offer to recall him to his former position, was motivated by anti-Local 3 animus. I further conclude that Respondent Gilston has failed to prove, by a preponderance of the evidence, that Vitelli would have been laid off on October 17 even in the absence of his union activities. See *Transportation Management*, 462 U.S. 393, 399 (1983).

CONCLUSIONS OF LAW

1. Gilston Electrical Contracting Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Industrial and Allied Trades Workers Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, are each a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off its employee Robert Vitelli, on or about October 17, 1989, because he joined, supported, or assisted Local 3 and engaged in concerted activities for the purpose of collective bargaining or other mutual aid and/or protection, and in order to discourage other employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid and/or protection, Respondent Gilston has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By threatening its employees with discharge and other unspecified reprisals if they voted in a Board-conducted election for certification of representative, Respondent Gilston has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. At all times material, Respondent Local 363 has been the recognized collective-bargaining representative of certain of Respondent Gilston's employees by virtue of Respondent Gilston's membership in the United Electrical Contractors Association a/k/a United Construction Contractors Association, which was authorized by its members to act as collective-bargaining representative on their behalf in negotiating and administering collective-bargaining agreements with various labor organizations, including Local 363.

6. By threatening its members that it would encourage their discharge by their employer if they voted in a Board-conducted election for certification of representative, Local 363 has restrained and coerced employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that Respondents Gilston and Local 363 have violated Section 8(a)(1) and (3), and Section 8(b)(1)(A) of the Act, respectively, I shall recommend that they each cease and desist therefrom, and take certain affirmative actions necessary to effectuate the purposes of the Act. I shall recommend that Respondent Gilston be ordered to reinstate employee Robert. Vitelli to his former position, or, if no longer available, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any losses of pay or other benefits suffered by him, as a result of Respondent Gilston's discrimination against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

A. The Respondent Gilston Electrical Contracting Corporation, New York, New York, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against employees with respect to their hire or tenure of employment or any term or condition of employment because they joined, supported or assisted Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization or because they engaged in concerted activities for the purpose of collective bargaining or other mutual aid and/or protection.

(b) Threatening its employees with discharge and other unspecified reprisals if they voted in a Board conducted election for certification of representative.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Robert Vitelli immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any losses of earnings or other benefits he may have suffered by reason of his unlawful layoff in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its New York, New York facility copies of the attached notices marked ''Appendix A and Appendix B.''[3] Copies of Appendix A, on forms provided by the Regional Director for Region 29, after being signed by the Respondent Employer's authorized representative, and copies of Appendix B, after being duly signed by an authorized representative of the Respondent Union, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, International and Allied Trades Workers, Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(a) Threatening its members that it would encourage their discharge by their employer if they voted in a Board conducted election for certification of representative.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business office, meeting halls or other places where it customarily posts notices, copies of the attached notice marked ''Appendix B.''[4] Copies of said notices, on forms provided by the Regional director for Region 29, shall after duly signed by an authorized representative of the Respondent Union, be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days thereafter. Additional copies of Appendix B shall be duly signed by an authorized representative of Respondent Union and furnished to the said Regional Director for transmission to the Respondent Employer for posting by the Respondent Employer in accordance with the Order directed to the Respondent Employer above.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] See fn. 3, above.